



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 21, 2003

Ms. Stephanie Bergeron
Director
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2003-1945

Dear Ms. Bergeron:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178621.

The Texas Commission on Environmental Quality (the "commission") received a written request for information pertaining to the evaluations of "site operating plans" and the permit for "the BFI landfill in Bexar County, Texas." You state that some of the responsive information has been made available to the requestor. You contend, however, that the remaining information coming within the scope of the request is excepted from required disclosure pursuant to sections 552.103 and 552.107 of the Government Code.

Section 552.103 of the Government Code is often referred to as the "litigation" exception. To show that section 552.103(a) is applicable, the commission must demonstrate that (1) litigation was pending or reasonably anticipated on the date the commission received the records request and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

In this instance, you argue that the requested information

relates to the litigation pending in the Texas Court of Appeals, Third District, at Austin, *BFI v. Martinez Environmental Group*, Docket No. 03-02-00218-CV. The BFI case involves challenges to a landfill permit issued by [the commission]. The [commission] was named as a defendant in the original petition filed in District Court, and the [commission] continues

to be a party to the litigation. Part of the BFI case concerns whether the permit issued to BFI contains adequate Site Operating Plans (SOP). The SOP issues include provisions dealing with control of windblown waste, fire protection, and hazardous waste detection and prevention.

Based on your representations and our review of the submitted documents, we conclude that you have established that the submitted information relates to litigation to which the commission is a party and that the litigation was pending on the date the commission received the records request. The commission therefore may withhold the submitted information in its entirety pursuant to section 552.103 of the Government Code.¹

In reaching this conclusion, we assume that the opposing party to the litigation has not previously had access to the records at issue; once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Consequently, if the opposing parties in the litigation have seen or had access to these records, there would be no justification for now withholding those records from the requestor pursuant to section 552.103. We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

¹Because we resolve your request under section 552.103, we need not address your arguments regarding the applicability of section 552.107 of the Government Code.

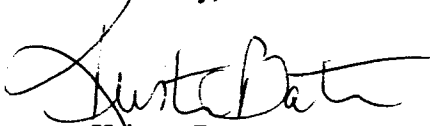
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/RWP/seg

Ref: ID# 178621

Enc: Submitted documents

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(w/o enclosures)